Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Commercial Leased Access	)	MB Docket No. 07-42
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105

REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

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Charter Communications, Inc. ("Charter") respectfully submits these Reply Comments in the above-referenced proceeding.

INTRODUCTION AND SUMMARY

Charter strongly supports the Comments already submitted by NCTA – The Internet & Television Association ("NCTA"), which argue convincingly in favor of reconsidering and reducing the burdens posed by leased access regulation. Although Charter respects the diversity objectives underlying commercial leased access, it shares NCTA's belief that, in the years since Congress adopted Section 612 of the Communications Act,[1] "the video marketplace has been radically transformed in a manner that makes leased access an anachronism."[2]

In response to the Commission's specific inquiry regarding First Amendment concerns, Charter agrees with NCTA that "leased access is no longer sustainable under the First Amendment."[3] As explained in NCTA's Comments and well-understood by this Commission, the video marketplace has experienced dramatic changes since the D.C. Circuit Court of Appeals

[1] 47 U.S.C. § 532.

[2] NCTA Comments at 3.

[3] *Id.* at 11.

upheld Section 612 more than two decades ago. The Commission should now, consistent with its constitutional and statutory duties, use this proceeding to minimize the unconstitutional regulatory burdens that leased access needlessly imposes on cable operators. At a minimum, the Commission should reject the additional burdens advocated by certain leased access users and adopt the less burdensome approach advanced by NCTA.

I. THE COMMISSION HAS A CONSTITUTIONAL DUTY TO CONSIDER THE FIRST AMENDMENT IMPLICATIONS OF LEASED ACCESS.

The Commission has an obligation to thoroughly assess the constitutionality of any leased access requirements it adopts and enforces. This is true, notwithstanding the fact that the underlying leased access obligation was enacted by Congress, and facially upheld in an early legal challenge to the statute.[4] As a former FCC Chairman long ago observed, "[t]his Commission has an obligation to continually re-explore—for both our own benefit and for the benefit of Congress—any doctrine that precludes full exercise of journalistic rights by the electronic media."[5] This duty exists by virtue of the FCC's role as an expert independent regulatory agency with jurisdiction over media protected by the First Amendment,[6] and this Commission has properly recognized its responsibility to consider the First Amendment implications of leased access and uphold the Constitution.[7]

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[4] *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 967-71 (D.C. Cir. 1996) ("*Time Warner Entertainment Co.*").

[5] *Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees*, 49 Fed. Reg. 20317, 20344 (May 14, 1984) (separate statement of Commissioner James H. Quello).

[6] It is beyond dispute that "cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

[7] *See Further Notice of Proposed Rulemaking, Leased Commercial Access, Modernization of Media Regulation Initiative, FCC 18-80 (June 8, 2018)* ¶ 25 ("[w]e also seek comment on whether there have been any changes in the video distribution market since Congress and the

A. The Commission Must Evaluate Changes in Technology as Part of its Constitutional Review

The FCC's constitutional review must include an analysis of the current marketplace and contemporary technology. In a pair of rulings issued at the end of this past term, the Supreme Court reaffirmed that its own constitutional rulings must be continually reassessed in light of such changes. In *South Dakota v. Wayfair, Inc.*,[8] the Court affirmed that it should "focus on rules that are appropriate to the twenty-first century, not the nineteenth."[9] It held that the Commerce Clause could no longer be interpreted to preclude states from collecting taxes simply because a business lacked a "physical presence" in the jurisdiction, because "dramatic technological and social changes" had rendered the physical presence rule "anachronistic."[10]

The day after it issued *Wayfair*, the Court held that the Fourth Amendment requires the government to obtain a search warrant in order to use cell tower location data to track suspects, notwithstanding earlier rulings that obtaining information "shared" with phone companies was not a "search" requiring a warrant.[11] Writing for the Court, Chief Justice Roberts explained that the government's position "fails to contend with the seismic shifts in digital technology" that make use of such information far more intrusive.[12] He observed that "when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes,

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FCC first addressed these issues that are relevant to the First Amendment analysis."); Statement of Commissioner Carr ("With relatively lower barriers to distributing content, including through online platforms, and a greater number of distribution options, I am interested in hearing from commenters about whether our approach remains consistent with the First Amendment.").

[8] 138 S. Ct. 2080 (2018).

[9] *Id*. at 2092 (citation omitted).

[10] *Id*. at 2095.

[11] *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (limiting the reach of *Smith v. Maryland*, 442 U.S. 735 (1979)).

[12] *Id*. at 2219.

conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements."[13]

The need to continually reassess constitutional principles applies with special force to the Commission, an agency that necessarily "works in the shadow of the First Amendment."[14] And it is difficult to imagine a business sector that has experienced more "seismic shifts in digital technology" than the communications industry generally and video programming distribution specifically. A leased access regime based on cable's "bottleneck monopoly power" is no longer sustainable.[15]

B. The Prior Constitutional Review of Leased Access Requirements Must Be Updated

Much has occurred in the twenty-two years since the D.C. Circuit decided *Time Warner Entertainment Co.* – both with respect to the underlying First Amendment jurisprudence and the technology of the media landscape to which that jurisprudence applies. These changes make it imperative that the Commission reevaluate these legal and factual factors in this proceeding as it considers reforming the existing leased access rules.

Changes in legal doctrine since *Time Warner Entertainment Co*. was decided are alone sufficient to require the Commission to reconsider the constitutional basis underlying the leased access regime. Subsequent to that 1996 decision, the Supreme Court clarified that plaintiffs raising facial First Amendment challenges to a statute may prevail if they establish that the

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[13] *Id*.

[14] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 556 (2009) (Breyer, J., dissenting).

[15] *See Comcast Cable Communications v. FCC*, 717 F.3d 982 (D.C. Cir. 2013) (Kavanaugh, J. , concurring)("[I]n light of the Supreme Court's precedent interpreting the First Amendment and the massive changes to the video programming market over the last two decades, the FCC's interference with . . . editorial discretion [under Section 616] cannot stand.").

challenged statutory provision would restrict or chill a substantial amount of speech relative to the provision's legitimate sweep.[16]

Under current First Amendment jurisprudence, leased access arguably should be subject to "strict" or "heightened" scrutiny.[17] Assuming *arguendo* only "intermediate" scrutiny is required (the standard applied by the D.C. Circuit more than 20 years ago), the leased access regime is still constitutionally suspect. "[I]f the Government [can] achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so."[18] The Commission is constitutionally required to adopt rules that avoid any undue restrictions on cable operators' First Amendment rights.[19]

Even if governing constitutional law had not evolved since 1996, the media environment itself has been transformed – and any notion existing at that time that cable operators were "gatekeepers" has been debunked by the nature and magnitude of the intervening transformation. The Internet did not exist when leased access was created by Congress, but it has now clearly revolutionized the communications industry. Programmers, both big and small, can today place programming on the Internet and convey their message to the public without the need for leased

[16] *United States v. Stevens*, 559 U.S. 460, 473 (2010).

[17] Under more recent Supreme Court precedent, the leased access regime arguably involves impermissible speaker- and content-based discrimination and also subjects cable operators to disfavored treatment, thereby triggering strict (or at least heightened) scrutiny. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557, 563 (2011) (speaker-based and content-based restriction of commercial speech subject to "heightened" scrutiny"); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 641 (5th Cir. 2012) (applying strict scrutiny to franchising rules that targeted a small number of cable providers).

[18] *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002).

[19] *See, e.g., Cigar Ass'n of America v. FDA*, 2018 WL 3304627 (D.D.C. July 5, 2018) (compelled disclosures must be no broader than necessary even under lesser degrees of scrutiny).

access. Indeed, programmers can now reach any household with an Internet connection. The prospective audience for video programming is in no way dependent on cable service.

The Commission need look no further than its own annual Video Competition Reports to know that the factual basis for the leased access rules no longer exists. Between the first such Report in 1994 and the most recent version issued in 2018, entirely new categories of competitors have emerged that allow independent video programmers today to bypass cable service entirely.[20] Neither the Internet nor Online Video Distributors ("OVDs") are even mentioned in the 1994 Report – which is hardly surprising as neither had yet developed as a source for video distribution.[21] Leaving aside the emergence of competing MVPDs, cable operators now see OVDs as primary competitors.[22] In short, the Commission's own Video Competition Reports document how the factual justification underlying leased access requirements has evaporated.[23]

Internet access, along with competition to incumbent cable operators from both MVPDs and OVDs, undermine the constitutionality of leased access. A statutory obligation predicated on an entirely different media landscape cannot avoid constitutional scrutiny under today's marketplace. The existing leased access regime fails even intermediate scrutiny because it: (a) no longer directly or materially advances a substantial governmental interest; and (b) is not narrowly tailored under present circumstances.

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[20] *First Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* , 9 FCC Rcd. 7442 (1994); *Eighteenth Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 32 FCC Rcd 568 (2017)("*Eighteenth Report*").

[21] *Eighteenth Report* ¶¶ 130-138.

[22] *Id*. ¶¶ 55-58.

[23] *See also* NCTA Comments at 8 n.7 (setting forth the dramatic decline in vertical ownership in national cable programming networks from 52.8% in 1994 to 9.1% in 2017).

Justice Kennedy observed nearly a decade ago that "there may be instances when it becomes apparent to an agency that the reasons for a longstanding policy have been altered by discoveries in science, advances in technology, or by any of the other forces at work in a dynamic society."[24] At a minimum, the Commission has an obligation to take actions that are within its jurisdiction and consistent with the Constitution.[25] Indeed, the implementing agency can and must interpret the statute to avoid constitutional infirmity (including adopting a saving construction). Leased access regulations that are not statutorily mandated should be eliminated.

C. The Commission Must Adopt the Least Constitutionally Intrusive Approach

Significantly, the statute itself requires the Commission to minimize the constitutional problems inherent to leased access. Section 612 expressly mandates that the Commission promulgate implementing rules so that any leased access obligation is "consistent with the growth and development of cable systems."[26] The governing statute further instructs the Commission to ensure that "the price, terms, and conditions of [leased access] use . . . are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[27] Given Congress' obvious commitment to minimizing the adverse effects of leased access on cable operators, and the constitutional concerns outlined above, the Commission has a heightened responsibility (and the necessary discretion) to set the terms and conditions for leased access to avoid and/or minimize regulatory burdens, particularly where independent programmers have alternative avenues for reaching potential viewers.

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[24] *Fox Television Stations*, 556 US at 535 (Kennedy, J., concurring).

[25] *See, e.g., Meredith Corp. v. FCC*, 809 F.2d 863, 874 (1987) ("Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it.").

[26] 47 U.S.C. § 532(a).

[27] *Id.* § 532(c)(1).

Charter respectfully submits that the Commission should exercise its discretion in this rulemaking to minimize the serious constitutional problems associated with leased access requirements. In light of the radically changed conditions described above, the Commission should, if nothing else, adopt the regulatory changes advanced in NCTA's Comments and reject the additional regulatory burdens suggested in the Comments submitted by various leased access users. [28]

II. THE RULES SHOULD BE MODIFIED TO MAKE LEASED ACCESS LESS BURDENSOME ON CABLE OPERATORS.

Charter agrees with NCTA that First Amendment concerns, the current marketplace, and the statute itself *all* compel the Commission to adopt regulatory modifications in this proceeding "that *alleviate* rather than *exacerbate* the burdens imposed by leased access."[29] As a preliminary matter, these factors compel the Commission to vacate the badly flawed (and never-implemented) 2008 Report and Order.[30] These same factors should prompt the Commission to reconsider the existing rules to ensure that that they do not unduly burden cable operators.

Part-time leased access is perhaps the single most conspicuous area for regulatory reform. The FCC has already acknowledged that part-time leased access is *not* required under the statute.[31] Without an explicit statutory mandate, the Commission should not unilaterally expand leased access to encompass part-time use. Even if doing so were justifiable at one point, the

[28] We would encourage the Commission, in its next report to Congress on the current state of the video marketplace, to include a recommendation that the leased access statute be repealed.

[29] NCTA Comments at 16.

[30] *See* NCTA Comments at 4, 15-16.

[31] *See* NCTA Comments at 22; *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Leased Commercial Access, Report and Order*, 12 FCC Rcd. 5267, 5297 (1997) ("[W]e recognize that part-time leasing is not expressly required by the statute, that it may impose administrative and other costs on cable operators, and that it may pose the risk of capacity being under-used.").

current video marketplace undermines any possible constitutional basis for this substantial and burdensome regulatory expansion.

Part-time programmers today have many, and more effective, distribution options to reach potential viewers, including bountiful "paid programming" opportunities on established broadcast and cable channels and, even more importantly, a vast array of Internet platforms that today are accessible to a far greater number of consumers than subscribe to conventional cable service.[32] For YouTube alone, more than 300 hours of video are uploaded each minute, and there are more than 30 million visitors with almost 5 billion videos watched every single day.[33] Finally, accommodating part-time leased access necessarily imposes a host of day-to-day operational burdens on cable operators that extend far beyond those inherent to full-time leased access and lie outside the standard business model for the modern cable industry, under which linear channels are carried on a full-time basis. Given these considerations, Charter agrees with NCTA that the Commission should remove rules governing part-time access entirely from its leased access regulations.[34]

Charter supports each of the other regulatory changes advanced in NCTA's Comments. NCTA's regulatory proposals, after all, are *not* designed to deter *bona fide* leased access use, but rather to mitigate the adverse impacts on host cable systems. The simple truth is that cable

[32] *See* NCTA Comments at 10 ("The Internet, therefore, is not simply a substitute for leased access. It is a superior alternative to leased access and has achieved what leased access could not.").

[33] Videonitch.com/2017/12/13/36-mimnd-blowing-youtube-facts-figures-statistics-2017-re-post/.

[34] If the Commission retains part-time leased access requirements (even though modifying these anachronistic rules as described above is constitutionally required), it should at least adjust the regulations to mitigate some of the most glaring burdens associated with part-time use. These changes (as requested by NCTA) should include increasing the usage commitments for triggering deployment of a part-time leased access channel and adjusting the rate formula to compensate for under-utilized channels resulting from part-time leased access.

operators clearly face legitimate business concerns when they are compelled by regulation to deal with each and every leased access applicant. Leaving editorial considerations entirely aside, most leased access programmers lack the performance record and financial resources of commercial programmers with whom the operator would customarily engage, and history has shown that the underlying leased access business model is dubious at best. Moreover, technological advancements assure that leased access programmers now have a plethora of low cost options for distribution of their programming if they are unable or unwilling to meet these minimum requirements. Accordingly, the Commission should adopt the modest proposals advanced by NCTA regarding reasonable application fees and deposits.

The Commission should also eliminate any artificial rate cap on leased access use or, at a minimum, adopt NCTA's proposal that operators offering carriage of leased access channels on the Basic Service Tier be allowed to limit the resulting rate calculation to the Basic Service Tier. As explained in NCTA's Comments, the "tier neutral" element of the existing multi-tier formula predates (and is no longer relevant under) the current state of cable rate regulation. Furthermore, limiting an operator's leased access calculation to the Basic Service tier would simplify that calculation and better align with the operator's unregulated marketing decisions regarding service tier composition and rates.[35]

Charter further urges the Commission to reject proposals from leased access users to impose even more burdensome requirements on cable operators.[36] Given the constitutionally

[35] *See* NCTA Comments at 26-27. Charter also supports NCTA's proposal that operators have the option of replacing system-specific leased access rates with revenue-neutral regional or national rates. *Id.*

[36] Leased access complaints in this proceeding regarding operator responsiveness, *see e.g.*, Comments of Small Business Network, exaggerate the adverse impact any such behavior has on the viability of leased access activities and disregard the business priorities of cable operators. On a very practical level, the leased access users have failed to explain why it is *necessary* that

flawed status of leased access, the Commission certainly should not add any additional obligations now – thirty-four (34) years after Congress first imposed leased access requirements on the cable industry. In the current media marketplace, Section 612 itself is constitutionally infirm, and any new regulatory burdens simply could not survive constitutional scrutiny. Adding such burdens on cable operators now would be both unconstitutional and bad public policy. As explained in NCTA's Comments, "The economics of . . . leased access were never conducive to its purpose."[37] The Commission should resist proposals intended to prop up leased access users at the expense of cable operators in an era where leased access makes less economic (and legal) sense than ever.[38]

Charter specifically disagrees that operators should be required to make leased access available to discrete portions of a cable system (rather than the entire system) wherever it is "technically feasible" to do so.[39] The statute does *not* require that leased access be accommodated in this piece-meal fashion, and doing so would run contrary to prior Commission holdings[40] and standard industry practice regarding the carriage of commercial programming

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they be supplied immediately with detailed information on leased rates, even though that calculation involves a host of constantly changing variables, including system-specific channel-line-ups, programming costs, service rates, and local subscriber counts. There has been no claim in this proceeding that commercial cable channels cable operators voluntarily carry are launched at a faster pace than leased access channels. Consistent with NCTA's Comments, operators should be given more, rather than less, time to complete any rate calculations.

[37] NCTA Comments at 7.

[38] Leased access commenters seeking to impose more onerous obligations disregard the failure of the 2008 leased access rules to withstand scrutiny by both OMB and the Sixth Circuit Court of Appeals, let alone the changes in the video marketplace in the intervening decade.

[39] *See* Comments of LAPA and Combonate Media Group.

[40] *See Leased Commercial Access, Report and Order and Further Notice of Proposed Rulemaking,* 23 FCC Rcd. 2909, ¶ 16 (2008).

services.[41] Charter also disagrees that operators should be required to make leased access available in HD. Again, the statute does *not* expressly require that leased access be accommodated in this fashion, and doing so would *not* further the diversity objective underlying commercial leased access. To the contrary, an HD mandate would potentially expand the spectrum burdens associated leased access without any corresponding expansion in the amount of distributed leased access programming.

CONCLUSION

Charter appreciates the Commission initiating this proceeding and acknowledging the potential First Amendment implications of leased access. In light of the current media landscape (which has been dramatically transformed by the Internet), Charter urges the Commission to take all steps within its regulatory authority to minimize the regime's constitutional infirmity.

Respectfully submitted,

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[41] A consistent channel line-up is desirable for a host of operational and competitive reasons.